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Supreme Court of the United States

OCTOBER TERM, 1945

THE STATE OF TEXAS,
Petitioner

v.

ANTONIO C. CHUOKE, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Supreme Court of The United States:

The Attorney General of the State of Texas, in behalf of the State of Texas, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on March 6, 1946, affirming the judgment of the United States District Court for the Southern District of Texas. The Circuit Court overruled the Petition for Rehearing of the State of Texas in this cause on April 15, 1946.

SHORT STATEMENT OF THE CASE

Part of Sydnor's Bayou, an arm of the Gulf of Mexico, and within the borders of the State of Texas, adjacent to Galveston Island, Texas, and which cuts into the north side of Galveston Island, was condemned by the United States of America in the Federal District Court. The State of Texas and respondents here each alleged title to such submerged lands and claimed compensation therefor. R. 1, 3, 4. The District Court held a TITLE ADJUDICATION HEARING and rendered judgment declaring such submerged lands to have belonged to respondents herein before the condemnation and determined that respondents were entitled to receive the compensation for the taking thereof by the Federal Government. R. 10. The State of Texas appealed from said judgment to the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court on March 6, 1946, affirmed the judgment denying recovery to the State of Texas and declaring the submerged lands in question to have been owned by respondents but not on all the grounds relied on by the District Court. R. 28. On April 15, 1946, the Circuit Court overruled the petition for rehearing of the State of Texas. The State of Texas now petitions for writ of certiorari to review the decision of the Circuit Court.

The submerged portions of eight (8) lots are involved herein. Five lots (Nos. 288, 285, 269, 284 and 289) are referred to in the record as the "auction lots." The other three lots (Nos. 270, 272 and 255) are referred to in the record as the "Hall & Jones Patent Lots."

1. *The Auction Lots*

In 1837 the Congress of Texas passed an Act directing that part of the "ISLAND OF GALVESTON" be surveyed into lots and hold at auction (See Appendix p. 52). In 1838 the Congress of Texas passed a Joint Resolution directing the President of the Republic and the Commissioner of the General Land Office to issue titles to purchasers of such auction lots "*ON* GALVESTON ISLAND." (See appendix, p. 54). The survey of the auction lots was reflected solely by the Trimble & Lindesey map of Galveston Island, a certified copy of which is an exhibit herein. According to such map the five auction lots in question (Lots Nos. 288, 285, 269, 284 and 289) included within the perimeter of its field notes the submerged portions of the Gulf of Mexico now in question. Patents were issued by the ministerial officers of the State of Texas to said lots, describing said lots merely by reference to said map. Respondents claim title to submerged lands through such patents. The State of Texas says that the Acts of the Texan Congress above referred merely authorized the sale of "*LAND*" "*ON*" "*GALVESTON ISLAND*," and that the submerged portions of the portion of Sydnor's Bayou, a part of the Gulf of Mexico, was (1) not "*LAND*" but in contemplation of law, was "*WATER*" (*DeMerit* v. *Robinson*, Supreme Court of Texas, 116 S. W. 796,797), (2) that Sydnor's Bayou, a part of the Gulf of Mexico, was no part of Galveston Island, any more than the Atlantic Ocean, of which Sydnor's Bayou was a part could be said to be a part of Galveston Island and

therefore the ministerial officers of the Republic of Texas were not authorized to attempt to convey any part of Sydnor's Bayou, the Gulf of Mexico or any part of the Atlantic Ocean, same not being LANDS *ON* GALVESTON ISLAND. (3) The State of Texas further says that it is a well settled rule of property law in the State of Texas that a *certain and specific intention* on the part of the Government must appear to divest itself of title to land under water and that *the mere inclusion of submerged lands within the perimeter of field notes of a grant is not sufficient to divest the State of ownership thereof, City of Galveston* v. *Menard*, 23 Tex, 349; *Heard* v. *Town of Refugio*, 103 S. W. (2) 728; *State State* v. *Bradford*, 50 S. W. (2) 1065; *Landry* v. *Robinson*, 219 S. W. 819; *Rosborough* v. *Picton*, 43 S. W. 1033, and *Hynes* v. *Packard*, 45 S. W. 562, *and* that therefore the Acts and the patents to the auction lots in question do not show the required and certain specific intention necessary to convey such submerged land.

2. *The Hall & Jones Patent Lots*

Very little of the West end of Galveston Island was bid in at the auction. Thereafter land scrip was located by Edward Hall and Levi Jones on all the West End of the Island except those portions bid in at the auction. The locating surveyor ran his perimeter line across the mouth of Oyster Bayou (now called Offitt's Bayou) which is a large bay called a bayou adjacent to the north side of the Island, being an arm of the Gulf of Mexico where the tide ebbs and

flows. (See Exhibits). Sydnor's Bayou is an arm of Offitt's Bayou which is an arm of the Gulf of Mexico. In 1851 the Supreme Court of Texas held this patent VOID because islands were not, at the time of Hall & Jones' location, subject to location of land scrip. *State* v. *Delesdenier*, 7 Texas 76. In February, 1854, the Legislature of Texas passed an Act confirming the Hall & Jones patent "FOR LANDS ON GALVESTON ISLAND" (See Appendix P. 54) Respondents contend this Act granted to Hall & Jones and their successors title to the soil under the waters of Sydnor's Bayou of Lots Nos. 270, 272 and 255; the State of Texas contends that it did not for the reasons stated above with reference to the auction lots, as will be more specifically shown in the Supporting Brief herein.

BASIS OF JURISDICTION

This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347a) and Supreme Court Rule 38, Paragraph 5b, because—

1. The Circuit Court of Appeals in this cause has decided a highly important question of local law of the State of Texas in conflict with applicable local decisions of the Supreme Court of the State of Texas.

2. The judgment of the Circuit Court of Appeals in this cause is in conflict with decisions of the Su-

preme Court of Texas on rules of real property in Texas.

3. The decisions of the Texas Supreme Court referred to in 1 and 2, supra, with which the Circuit Court of Appeals is in conflict are as follows:

City of Galveston v. Menard, 23 Tex. 390.

Heard v. Town of Refugio, 129 Tex. 349, 103 S. W. (2) 728.

Rosborough v. Picton, 12 Tex. Ct. App., 34 S.W. 791, 792, 43 S. W. 1033 (approved in Hynes v. Packard, 92 Tex. 44, 49; 45 S. W. 562).

State v. Bradford, 121 Tex. 515, 50 S. W. (2) 1065.

De Merit v. Robinson, 102 Tex. 358, 116 S. W. 796.

Landry v. Robison, 110 Tex, 295, 219 S. W. 819.

City of Galveston v. Mann, 135 Tex. 319, 143 S. W. (2) 1028.

Lorina v. Crawford Packing Co., 142 Tex. 51, 175 S. W. (2) 410.

Filipas v. Chuoke, 40 S. W. (2) 38.

THE QUESTIONS PRESENTED

1. The first question presented to this Court is whether the State of Texas or Respondents herein owned the submerged portions of Sydnor's Bayou which passed through the "auction lots" at the time of the "taking" by the United States of America and whether the State of Texas or respondents are entitled to the compensation for such "taking."

2. The second question presented to this Court is whether the State of Texas or Respondent herein owned the submerged portions of Sydnor's Bayou which passed through the "Hall & Jones Patent lots" at the time of the "taking" by the United States of America and whether the State of Texas or Respondents herein are entitled to the compensation due for such "taking."

REASONS FOR GRANTING THE WRIT

The principles of law involved in the present suit are highly important to the jurisprudence of the State of Texas and to the school children of Texas. The State of Texas owns millions of acres of sub-

merged lands which have been dedicated by the Constitution of Texas to and for the benefit of the public schools of Texas. The State of Texas is highly interested in seeing that the Federal Courts in deciding questions of local Texas law, especially when it affects the title to State lands, follow the applicable decisions of the Supreme Court of Texas. This the Circuit Court has not done in the case at bar. As will hereinafter be more clearly shown, the Circuit Court, after virtually holding in favor of the State of Texas on the merits, followed three discredited opinions of the Texas courts of Civil Appeals, which we will clearly point out are contrary to the opinions of the Supreme Court of Texas.

The case at bar is also highly important to the State of Texas as the title to Offitt's Bayou, a large and extremely valuable inland bay, adjacent to Galveston Island will be clouded by the erroneous decision of the Circuit Court, as the facts in the case at bar shows that the surveyor in the Hall & Jones patent ran his perimeter line across the mouth of Oyster Bayou (now Offitt's Bayou).

The Circuit Court in its opinion after stating that the question involved was a delicate question of Texas law, held that the case of *City of Galveston* v. *Menard*, 23 Tex. 343, did not rule the case in favor of appellees (now respondents), which ruling, we think, was controlling on the merits of the case, and the Circuit Court erred in not following through on its decisive holding on the effect of the Menard case

by ruling in favor of the State of Texas on the merits. The Circuit Court said at the conclusion of its opinion "for the narrow purposes of this case we are content to follow the conclusion reached by these Courts of Appeal, there being no decision of the Supreme Court otherwise," and affirmed the judgment on that basis. We will point out that the Circuit Court was clearly in error in following the discredited and repudiated Courts of Civil Appeals' opinions because the Supreme Court of Texas has held otherwise in many cases.

Because of the highly important legal principles involved with respect to well established real property law of the State of Texas and because of the great cloud cast against the title of the State of Texas, to Offitt's and Sydnor's Bayous, we respectfully say that the case at bar is highly important and that this cause should be reviewed by this Honorable Court.

WHEREFORE, Petitioner prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, directing it to certify to this court for review and determination the record and proceedings in Cause No. 11295, styled *State of Texas, Appellant* v. *Antonio C. Chuoke, et al, Appellees,* on the docket of that court, to the end that this cause may be reviewed and determined by this court as provided for by the statutes, laws and Constitution of the United States; and upon hearing that the judgment below be reversed and rendered in favor

of petitioner, and for such further relief as to this Court may seem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORAI

OPINIONS BELOW

The opinion of the District Court of the Southern District of Texas is reported in 57 Federal Supplement, pages 462, 463, 464, 465 and 466, and is found on pages 13-23 of the record, where said opinion is copied. The opinion of the Circuit Court of Appeals for the Fifth Circuit not yet reported is found on pages 28-32 of the record, where said opinion is copied.

GROUNDS OF JURISDICTION

The date of the judgment of the Circuit Court to be reviewed is March 6, 1946, with Motion for Rehearing being overruled on April 15, 1946. This Court has jurisdiction under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Sec. 347a), and Supreme Court Rule 38, paragraph 5b, because

1. The Circuit Court of Appeals in this cause has decided a highly important question of local law of the State of Texas in substantial conflict with applicable local decisions of the Supreme Court of Texas.

2. The judgment of the Circuit Court of Appeals in this cause is in substantial conflict with decisions of the Supreme Court of Texas on rules of real property law in Texas.

3. The decisions of the Texas Supreme Court (the highest court in Texas) referred to in 1 and 2, supra, with which the Circuit Court of Appeals is in conflict are as follows:

City of Galveston v. Menard, 23 Tex. 390.

Heard v. Town of Refugio, 129 Tex. 349, 103 S. W. (2) 728.

Rosborough v. Picton, 12 Tex. Civ. App. 34 S.

W. 791, 792, 43 S. W. 1033 (approved in Hynes v. Packard, 92 Tex. 44, 49, 45 S. W. 562).

State v. Bradford, 121 Tex. 515, 50 S. W. (2) 1065.

DeMerit v. Robison, 102 Tex. 358, 116 S. W. 796.

Landry v. Robison, 110 Tex. 295, 219 S. W. 819.

City of Galveston v. Mann, 135 Tex. 319, 143 S. W. (2) 1028.

Lorina v. Crawford Packing Co., 142 Tex. 51, 175 S. W. (2) 410.

Filipas v. Chuoke, 40 S. W. (2) 38.

4. The highly important principle of local Texas Law which is involved herein is as follows:

The Supreme Court of Texas has repeatedly held that submerged lands covered by tidewaters are in contemplation of law not land but water; that the Congress of the Republic of Texas and the Legislature of the State of Texas while having authority to convey submerged lands (but the ministerial officers of the State or Republic had no such power), could only do so by express and specific intent to convey the Republic's or State's title to such submerged lands, and that the mere inclusion of submerged lands within the perimeter of field notes of a grant was not sufficient to divest the State of Tex-

as of its title to such submerged lands. See the authorities listed in 3, supra.

5. The Circuit Court of Appeals erroneously held that the State of Texas had granted title to the respondents herein by virtue of grants which merely included the submerged lands in question within the perimeter of field notes of grants erroneously made by ministerial officers of Texas, and there is absolutely nothing in the Acts of the Republic, or of the Confirmation Act of 1854 of the Legislature of Texas, referred to in the short Statement of Facts, or in the Record in this case, to show any express or certain specific intention to convey the submerged lands in question. The Circuit Court's opinion is therefore in substantial and irreconciliable conflict with the opinions above cited of the Supreme Court of Texas.

STATEMENT OF THE CASE

The short statement of the case made in the preceding petition for certiorari on pages 2, 3, 4, 5 is hereby adopted and made a part of this brief.

In addition, attention is directed to the stipulation in the record that Sydnor's Bayou at the time of the "taking" by the Federal Government and at all times material hereto, was an arm of the Gulf of Mexico, where the tide ebbed and flowed. R. 6.

SPECIFICATIONS OF ERRORS

1. The Circuit Court erred in holding (through

reference to its written opinion) that the State of Texas was not, at the time of the "taking" by the United States of Amercia, owner of those portions of Lots Nos. 288, 285, 269, 284 and 289 (Lots patented after auction) which were submerged by tidewaters and not the proper party to receive the compensation therefor.

2. The Circuit Court erred in holding (through reference to its written opinion) that the State of Texas was not, at the time of the "taking" by the United States of America, owner of those portions of Lots 270, 272 and 255 (Lots included in the perimeter description of the Hall & Jones Patent) which were submerged by tidewaters, and not the proper party to be compensated for such "taking."

3. The Circuit Court erred in its interpretation of the holding of the Supreme Court of Texas in the case of *Heard* v. *Town of Refugio*, 129 Tex. 349, 103 S. W. (2) 728, and erred further in not giving weight to said opinion.

4. The Circuit Court erred in following and giving weight to the decisions of the Texas Courts of Civil Appeals in the cases of *Filipas v. Chuoke*, 10 S. W. (2) 807; *Baylor* v. *Tillebach*, 49 S. W. 720; and *North American Dredging Company* v. *Jennings*, 184 S. W. 287, cases in which the State of Texas was not a party, which cases are contrary to the decisions of the Supreme Court of Texas specifically referred to in paragraph 3 of Grounds of Jurisdiction, supra, of this Brief.

5. The Circuit Court erred in giving any weight whatever to the Trimble & Lindsey Map or long possession by defendants or payment of taxes on the submerged land in question, if the Circuit Court did give any weight to such matters. (Note: We cannot determine from the Circuit Court's opinion whether or not that court gave any weight to such matters, but the District Court did and out of an abundance of caution we wish to cite briefly the leading Texas cases which show clearly that adverse possession and payment of taxes will not divest the State of title, nor can the State be "mapped out" of any of its public domain).

SUMMARY OF ARGUMENT

The rule has long been established in the State of Texas that the State is the owner of the soil underlying the navigable waters, such as navigable streams, as defined by statute, lakes, bays, inlets and other areas within tidewater limits within its borders. *State* v. *Bradford*, 121 Tex. 515, 50 S. W. (2) 1065, and long list of authorities therein cited.

From its earliest history the State of Texas has announced its public policy that lands underlying navigable waters are held in trust by the State for the use and benefit of all the people. *Rosborough* v. *Picton*, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033, and cases cited therein; *Landry* v. *Robison*, 110 Tex. 295, 219 S. W. 819; *Hynes* v. *Packard*, 92 Tex. 44; 45 S. W. 562; *State* v. *Bradford*, 121 Tex. 515, 50 S. W. (2) 1065.

The rule is also firmly established in Texas that land under navigable waters passes by grant or sale only when so expressly provided for by the sovereign authority, and there is no presumption that there has been any act of the government which could have the effect of passing away its title. *No power under the law is given a surveyor or the Land Commissioner to grant soil under navigable waters, and no subsequent recognition or confirmation by the land commissioner of a survey made to pass soil under such waters will be presumed. Rosborough* v. *Picton,* supra; *City of Galveston* v. *Menard,* 23 Tex. 349; *Galveston City Surf Bathing Company* v. *Heidenheimer,* 63 Tex. 562; *State* v. *Bradford,* 121 Tex. 515, 50 S. W. (2) 1065.

By the rule of Civil law private ownership of land along the coast stops at the line of highest tide in winter, whereas the rule at common law restricts grants to the line of ordinary high tide. *City of Galveston* v. *Menard,* 23 Tex. 349, 399.

Presumption and the policy of Civil Law and of common law favor public ownership, and the mere inclusion of tidewater submerged land, river beds and other navigable waters within the boundaries of a survey is not sufficient to overcome the presumption of public ownership in the State of Texas. *Rosborough* v. *Picton,* supra, *Heard* v. *Town of Refugio,* 129 Tex. 349, 103 S. W. (2) 728 and cases cited therein.

The sea and the arms of the sea are "navigable

waters," as a matter of law, regardless of their depth. *City of Galveston* v. *Mann*, 135 Tex. 319, 143 S. W. (2) 1028; *Lorina* v. *Crawford Packing Company*, 141 Tex. 51, 175 S. W. (2) 410.

The Supreme Court of Texas has taken judicial knowledge that Sydnor's Bayou, here involved, is an arm of the sea, over which the tide ebbs and flows. *Lorino* v. *Crawford Packing Company*, 142 Tex. 51, 175 S. W. (2) 410, 413. That fact is not denied as it is stipulated in the record that at all times material hereto Sydnor's Bayou was an arm of the Gulf of Mexico, over which the tide ebbed and flowed.

An ordinary grant of land does not convey tidewater lands; an EXPRESS AND SPECIFIC INTENTION of the sovereign to convey is required to divest the State of title to such submerged lands and a grant by the sovereign will not be construed as attempting to convey submerged lands unless it EXPRESSLY or BY UNAVOIDABLE CONSTRUCTION so provides. *City of Galveston* v. *Menard*, 23 Tex. 349; *Rosborough* v. *Picton*, supra.

It is well established law in Texas that grants from the sovereign should be construed strictly in favor of the sovereign and nothing shall be deemed to be included unless it is provided in the Act itself. *Magnolia Petroleum Co.* v. *Walker*, 125 Tex. 430, 83 S. W. (2) 929 (Cert. Den. 296 U. S. 623, 56 S. Ct. 144, 80 L. Ed. 442) and long list of authorities there cited.

It is also well established law in Texas that neither adverse possession for a 100 years or more, payment of taxes nor official maps of the Land Office will divest the State of Texas of its title to land. *Weatherly* v. *Jackson*, et al, 71 S. W. (2) 259 ,and authorities there cited.

An "ISLAND" is a piece of land surrounded by water. Bouvier's Law Dictionary. An island is a body of land surrounded by water, and a body of submerged land, though covered by an aquatic vegetation, is not an island. *Webber* v. *Pere Marquette Boom Company*, 30 N. W. 469, 472, 62 Mich. 626, Words & Phrases, Vol. 22 p. 688.

After the above well established rules of Texas law are thoroughly and clearly understood, their application to the case at bar becomes a very simple matter.

The question with reference to the title to the auction lots is very simple. The Acts of the Republic of Texas Appendix pages 52-54, merely authorized the ministerial officers (1) to survey and sell lots *ON GALVESTON ISLAND* and (2) to issue titles to purchasers of lots *ON GALVESTON ISLAND*, therefore such officers had no authority to sell anything not on Galveston Island. We say that it is elementary that neither the Atlantic Ocean, the Gulf of Mexico nor Sydnor's Bayou, is any part of Galveston Island. FURTHERMORE, we say that the Acts of the Republic do not show any specific or express intention to convey Sydnor's Bayou or any

other portion of the Gulf of Mexico and under the rule of strict construction it must be held that there was no such intention. We also say that no acts of any surveyor, mapper, tax collector, ministerial officer of Texas nor any long occupier of the submerged lands can lawfully take away the State's title to said land. We further say that the erroneous Courts of Civil Appeals' opinions relied on by the Circuit Court in its opinion did not touch the auction lots in question in any way and the Circuit Court made a patent and inadverent error in so stating in its opinion as will be hereinafter more specfically pointed out in our argument.

Likewise the question with reference to the Hall & Jones Patent Lots becomes very simple.

The Act of 1854 of the Legislature of Texas (Appendix) confirms the Hall & Jones Patent for *LANDS ON GALVESTON ISLAND* and disclaims title to the LANDS described in the patent. Clearly, neither Offitt's Bayou, a large and extremely valuable arm of the Gulf of Mexico, nor Sydnor's Bayou, an arm of the Gulf of Mexico, can be said to be *ON GALVESTON ISLAND* nor can such bays be said to be LANDS, as the beds of said Bayous were, in legal contemplation, not "LAND" but WATER. *DeMerit* v. *Robison*, 102 Tex. 358, 115 S. W. 796 and under the rule of construction laid down by the Supreme Court of Texas there is no clear and specific express intent to convey Sydnor's Bayou, and as stated by the Supreme Court of Texas the mere inclusion of submerged lands within the perimeter of

field notes of a grant is not sufficient to divest the State of title to such submerged lands. We will also specifically point out in our argument why the three Courts of Civil Appeals' cases referred to by the Circuit Court are erroneous holdings in conflict with the Supreme Court of Texas which should not be followed.

The Circuit Court in its opinion virtually agreed with the State of Texas with respect to the effect of the Menard case. R. 32. The Circuit Court, after reaching its conclusion on the effect of the Menard case, should have decided the case on the merits for the State of Texas as the Menard case is largely controlling on the matter at bar. We, therefore, will discuss the Menard case fully in our argument.

We will also briefly discuss in our argument some of the other cases cited by us, including the case of *Heard* v. *Town of Refugio*, which we say the Circuit Court completely misinterpreted.

We will also briefly show in our argument why the State cannot be "mapped out" of its title to Sydnor's Bayou, and why neither adverse posession, nor payment of taxes can take away the State's title to Sydnor's Bayou.

ARGUMENT

1. ONLY THE SOVEREIGN BY ITS LEGISLATURE CAN CONVEY SYDNOR'S AND OFFITT'S BAYOUS.

The well settled law of the State of Texas with respect to the above stated point is aptly stated by the Supreme Court of Texas in the case of *State* v. *Bradford*, 121 Tex. 515, 50 S. W. (2d) 1065, as follows:

> "The rule long has been established in this state that the state is the owner of the soil underlying the navigable waters, such as navigable streams, as defined by statute, lakes, bays, inlets and other areas within tidewater limits within its borders.
>
> " . . .
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> " . . .
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> "From its earliest history this state has announced its public policy that lands underlying navigable waters are held in trust by the State for the use and benefit of all the people. Rosborough v. Picton, 12 Tex. Civ .App. 113, 34 S. W. 791, 43 S. W. 1033, and cases cited therein; Landry v. Robison, 110 Tex. 295, 219 S. W. 819; Hynes v. Packard, 92 Tex. 44, 45 S. W. 562.
>
> "The rule is also firmly established that land under navigable waters passes by grant or sale only when so expressly provided for by the sovereign authority, and there is no presumption that there has been any act of the government which could have the effect of passing away its title. *No power under the law is given the surveyor or the land commissioner to grant soil under navigable waters, and no subsequent recognition or confirmation by the land commissioner of a survey made to pass soil under such waters will be presumed.* Rosborough v. Picton, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033; City of Galveston v. Menard, 23 Tex. 349; Galveston

City Surf Co. v. Heidenheimer, 63 Tex. 562; Arnold v. Mundy, 6 N. J. Law, 1, 10 Am. Dec. 356; Tatum v. Sawyer, 29 N. C. (Hawks) 226; Martin v. Waddell, 16 Pet. 369, 10 L. Ed. 997." (Italics ours).

2. SYDNOR'S AND OFFITT'S BAYOUS WERE NOT "LAND" BUT "WATER" IN CONTEMPLATION OF LAW.

The case of *DeMerit* v. *Robison*, Supreme Court of Texas, 102 Tex. 358, 116 S. W. 796, held that the submerged lands under the shallow waters of San Jacinto Bay, which was an arm of GALVESTON BAY, and which at ordinary tide was covered with water to the depth of 18 inches but which was uncovered when the tide ebbed, was in contemplation of law, not land but water. The Supreme Court said:

> " . . . It follows that the relator had no right to purchase, nor had the commissioner power to sell, the soil lying below the line of ordinary high tide. *In contemplation of law it was not land, but water.*"

3. ONLY A SPECIFIC AND EXPRESS ACT OF THE LEGISLATURE CAN CONVEY SUBMERGED LANDS AND THE MERE INCLUSION OF SUBMERGED LANDS WITHIN THE PERIMETER OF FIELD NOTES OF A GRANT DOES NOT DIVEST THE STATE OF ITS TILE.

We quote from the opinion of the case of *Rosborough* v. *Picton*, * * * 34 Tex. 791, 43 S. W. 1033, (approved in *Hynes* v. *Packard*, 92 Tex. 44, 49, 45 S. W. 562) as follows:

"... These grants were extended to the original grantees in 1834 by the commissioner of Power & Hewitson's colony, the lands granted being situated within the bounds of the second contract of those colonists with the then existing government. . . . These grants included in the boundaries a portion of Hynes' Bay, a navigable arm of the Gulf of Mexico, and an area, more than 1,200 acres thereof, was covered by the waters of the bay, to which area, it is asserted, the title never passed out of the government. . . .

"*We think that there is no doubt that the proposition that the title to the land covered by the navigable waters of the bay did not pass by the grants is well founded.* According to both the common and civil law, an ordinary grant of land along the seacoast, made by the ministerial officer of the government, did not pass the title to land under water or beyond the coast line. This line was fixed by the common law at the point reached by ordinary high tide, and by the civil law at the mark of the highest tide. The exterior boundary line of the grant to Power & Hewitson was the seacoast (Sayles' Early Laws, 108; Hamilton v. Menifee, 11 Tex. 718); and no authority was given them over the waters of the sea or of the bays and inlets, or of the soil under them. These are, by well-settled principles, reserved for common use. Hence the grants by the commissioner of that colony passed title only to land which was not under the

waters of the sea. City of Galveston v. Menard, 23 Tex. 349; Bathing Co. v. Heidenheimer, 63 Tex. 562; Arnold v. Mundy, 6 N. J. Law, 1; Tatum v. Sawyer, 2 Hawks, 226; Martin v. Waddell, 16 Pet. 369. . . . Here the question is as to the power to grant that which, by the policy of all nations governed by the principles of the civil or common law, is retained for the public use, *and which passes by a private grant only when so expressly provided by the sovereign authority.* For the same reason, no subsequent recognition or confirmation of a grant made by a ministerial officer attempting to pass the soil under the sea would be presumed; and hence it was unnecessary for the plaintiff to allege that there had been no such confirmation. In the first place, the power was not given to the commissioner of the country to grant soil under navigable waters; and, *in the second place, his grant would not be construed as attempting to do so unless it expressly or by unavoidable construction so provided; and the same reason which would thus limit the effect of such grants would forbid any assumption that there had been any act of the government which could have the effect of passing away its title to soil under the water.*"

The Supreme Court of Texas in the case of *Hynes* v. *Packard*, supra, approved the *Rosborough* v. *Picton* case and said:

"The two Hynes surveys extended across Hynes Bay, and included in their boundaries, as given in the deed of conveyance, 1,209.26 acres of the navigable water area of the bay. Hynes Bay connects with the Espiritu Santo Bay, and the latter connects with the Gulf of Mexico, so

that the water area embraced as above stated lies beyond the coast line, and the title did not pass by the grant made to Peter Hynes and John Hynes....

"In Rosborough v. Picton, 34 S. W. 791, the title to the same land was involved, and the court of Civil Appeals in a very clear opinion by Judge Williams, decided that the land was not the subject of grant by the officer who executed the Hynes titles, and that no right passed by such grants. We think such decision is correct."

We quote from the opinion of the Supreme Court of Texas in the leading case of *Heard* v. *Town of Refugio*, 129 Tex. 349, 103 S. W. (2) 728, as follows:

"The positive statements above quoted from opinions of the Supreme Court to the effect that a law of Coahuila and Texas forbade the making of surveys across rivers and other streams, together with what appears to be the implied prohibition in article 29 of the Act of 1832, are sufficient, we think, to support the conclusion that the inclusion of the bed of the Mission river within the boundaries of the survey made in 1834 for the Town of Refugio was contrary to law and that the sovereign retained the title to the river bed. *We need not rest the decision, however, on that ground.* It was within the power of the sovereign to grant to a town or to an individual the bed of public water. City of Galveston v. Menard, 23 Tex. 349, 391; Knight v. United Land Association, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974, 983. But it is well settled that a more certain and specific intention on the part of the government must appear to divest itself of title to land under water than

is required for the passing of title to land not so covered. City of Galveston v. Menard, 23 Tex. 349; State v. Bradford, 121 Tex. 515, 50 S. W. (2) 1065; Landry v. Robison, 110 Tex. 295, 219 S. W. 819; Rosborough v. Picton, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033 (approved in Hynes v. Packard, 92 Tex. 44, 45 S. W. 562). In State v. Bradford, Associate Justice Sharp, writing as Commissioner the opinion of the court, said: 'The rule is also firmly established that land under navigable waters passes by grant or sale only when so expressly provided for by the sovereign authority, and there is no presumption that there has been any act of the government which could have the effect of passing away its title.' It is not to be presumed that the Mexican government intended to grant to the Town of Refugio the title to a part of the bed of Mission river, and we must conclude that the title to the river bed did not pass by the grant made in 1834 unless a certain and specific intention that it pass can be found in the documents or other evidence of the grant or in the statutory law in effect when the grant was made or in some settled rule or policy of the civil law then prevailing in Mexico.

" . . .

"Looking generally to the rules and policies of the civil law, we find that they negative rather than prove the existence of an intention on the part of the government to divest itself of title to the bed of a stream of this size and kind. The civil law prevailing in Mexico was most favorable to public ownership. A striking example of that fact is found in the law of Mexico by which all mines belonged to the sovereign

and under which minerals did not pass by the ordinary grant of land without express words of designation. Cox v. Robison, 105 Tex. 426, 431, 150 S. W. 1149. Law 6, title 28, part 3 of the Partidas declares that, 'Rivers, harbors, and public highways belong to all persons in common.' . . . By the rule of the civil law private ownership of land along the coast stops at the line of highest tide in winter, whereas the rule at common law restricts grants to the line of ordinary high tide. City of Galveston v. Menard, 23 Tex. 349, 399.

" . . .

"We do not hold that all grants made under the laws of the State of Coahuila and Texas that include within their exterior boundaries beds of rivers are void as to the river bed areas. But we hold that the Town of Refugio did not acquire by the grant of the four leagues of land made to it in 1834 title to the part of the bed of the Mission river within the four leagues. There is no evidence in the law by virtue of which the grant was made or in the documents effecting the grant, of a certain and specific intention on the part of the government to divest itself of title to the river bed. *'Presumption and the policy of the Mexican civil law favor public ownership, and in our opinion the mere inclusion of the river bed area within the boundaries of the survey of the four leagues is not sufficient to overcome that presumption and policy.*" (Italics ours).

Also, see the leading case of *City of Galveston* v. *Menard*, 23 Tex. 349, which is hereinafter fully discussed.

From the above authorities it is crystal clear that only the Legislative branch of the government had authority to convey Sydnor's and Offitt's Bayous; that the acts in question do not EXPRESSLY convey such WATER, same being in contemplation of law not LAND but WATER; that the Acts in question merely authorize the sale of *LAND ON GALVESTON ISLAND;* that neither the ministerial officers of Texas nor any surveyor nor map maker had any authority from the sovereign to include Sydnor's and Offitt's Bayous within the perimeter of the field notes of the grants in question and none of said acts divested the State of its title to the bed of such bayous.

4. DISCUSSION OF THE MENARD CASE

The case of *City of Galveston* v. *Menard,* 23 Tex. 349, Supreme Court of Texas, we think is one of the paramount controlling cases on the question at bar.

The Menard case holds that an ordinary grant will not convey tidelands; that only an extraordinary grant for specific and express purposes will do so. The grant in the Menard case going 150 feet to the channel in Galveston Bay, in order to get to deepwater, was upheld as an extraordinary grant and abundant, voluminous and detailed facts and circumstances in the record show why it was upheld as an extraordinary grant. The Menard grant stands because of the abundant facts in the record supporting the proposition that it was an extraordinary grant from the State to the Channel of the Bay of Galveston for the specific purposes of building a port

city, wharves, docks, etc. and the court found *from the record and evidence* in the Menard case that it was clearly the intention of the Republic of Texas to convey the submerged flats out to the channel to Menard for the specific purposes indicated.

The District Court held in its opinion that the Menard case ruled the case in favor of respondents. R. 20. The Circuit Court held that the Menard case did not rule this case in favor of respondents. R. 32. We think the Circuit Court was eminently correct in this respect but we vigorously assert that having so held the Circuit Court erred in not following through on this decisive ruling and should have then decided the case in favor of the State of Texas. The Menard case is rather lengthy but we sincerely believe that enough of it should be quoted here in order to clearly show what was before the court, the rules of law announced and *the facts and reasons upon which the grant was held to be an extraordinary one.* We therefore respectfully bespeak the indulgence of this Honorable Court in allowing us to quote from said case more voluminously than we would ordinarily do. We quote from the Menard case as follows:

> " . . . Menard, as original grantee, claimed a right to the flats, as part of the east end of Galveston island, sold to him by legislative grant, in 1836, and included in his patent, issued by the president of the Republic of Texas, in January, 1838, which calls for 'running with the channel of the bay,' in the northern boundary of the league granted.

"The plaintiff contends, that the legislative grant did not include the flats, as attempted to be granted by the president in the patent; that, notwithstanding the patent, the right thereto remained in the Republic and State of Texas, and was granted to plaintiff by the act of the legislature of 1851. Also, it is contended by the plaintiff, that if the flats were granted by the Republic to Menard, as part of the east end of Galveston island, they were dedicated to the public, as an open space between the city, and the navigable channel of the bay.

"The republic of Texas had the power, through its legislative department, to grant that part of the Galveston bay, which lies south of the channel, usually covered with salt water, which constitute what is called the 'flats'; and thereby vest an exclusive right in Menard to the soil thereof, and to the full ownership of the same, just as if it had been dry land.

"This power results, as a necessary consequence of the absolute sovereignty of the republic, over the territory included in its limits. The southern boundary of that territory was defined by (391) an act of the Texas congress, to extend from 'the mouth of the Sabine River, and running west along the gulf of Mexico, three leagues from land, to the mouth of the Rio Grande' etc. After annexation of Texas, the state, by an act of the legislature, re-affirmed its 'exclusive right to the jurisdiction over the soil, included in the limits of the late republic of Texas,' excepting such as may be vested in the United States by the constitution of the United States, and by the joint resolution of annexation. Hart. Dig. Arts. 1631, and 1634. . . .

"From the very nature of the property, which the government possesses in its navigable waters, and bays, and bayshores, it can be ordinarily best appropriated, by devoting it to public use; and by not granting away any exclusive right to it to any one. Because every one can use it, and derive advantage from it, and no injury is done to each other in its enjoyment. *It often happens, however, that the public use and enjoyment of this species of property may be promoted and increased, by allowing portions of it to become private property; as for wharves, docks and the like, in harbors and ports.* If the government could not exercise this right, in severing this common property, and appropriating portions of it to private use, it would not only curtail the ordinary powers, which every nation has for self-development, but it would presuppose a deficiency, in the sovereign power, to control or dispose of what belongs to it.

" . . .

"Whether, then, this legislative grant be considered with reference to the civil law, which was in force in Texas in 1836, or to the common law, to which her people were most accustomed, it must be held, that the government *had the power to make it.*

" . . .

"The act of the Texan Congress, passed on the 10th of December, 1836, provided, 'that all the right, title and claim which the government of Texas has, to one league and one labor of land, lying and situated on, and including the east end of Galveston Island, be, and the same is, hereby relniquished in favor of Michael B. Menard, and such associates as he may here-

after include; and all the right, title and interest which the government of Texas now has in and to said land, is hereby vested in said Michael B. Menard, and associates as he may hereafter include; provided, that nothing herein contained, shall affect the vested rights of third persons.' 1 Cong. 70.

"The main question is, does this act confer the right to the shore and flats, lying south of the channel of the bay? *If viewed as an ordinary grant of land, it does not. . . . By the civil law, the shores of the sea, of bays and navigable streams generally, as well as the tidewaters, were jealously guarded from private appropriation, and reserved for common use. . . .*

"*The well established doctrine of the common law, which is more favorable to private appropriation, than the civil law, is, that an ordinary grant of land upon a bay, whose tide ebbs and flows, does not convey the shore or any of the land of the bay covered with water.*

" . . .

"The true reason for requiring a more certain and specific intention to a grant, in the case of lands covered by tidewater, connected with bays and other navigable streams, than in case of land not so covered, is believed to be, not any difference in the degree of right, possessed by the sovereign power of the state; but the difference in the character of the property in its relation to, and connection with, other rights, such as of navigation, of fishing, etc., which may be and usually are, enjoyed in common by all the people of a state; and which are usually

kept continually under the protection of the government, directly or indirectly.

"In view of the full force of this rule of construction, we are satisfied, that this legislative grant was intended by the contracting parties to include the flats, so as to build a city upon Galveston island, with streets and lots running up to, and bordering on the channel of the bay. This conclusion is arrived at, from considering the object of the grant, its locality, and the acts of the contracting parties in relation to it. 1 Wheat. 116; Vatt. 311; Broom, Maxims, 536; 4 Gill & Johns. 1; 1 Co. Lit. 59. *This was not an ordinary sale, or donation of land, as upon certificate or scrip, for indefinite purposes; but it was a specific grant, directly made by the government, for a specific object; and it must be understood and construed, with reference to such object.* In the same act which made the grant, a part of the east end of the island, including the fort, was reserved; also one block of lots in a suitable part of the town, for a custom-house, and other public uses, to be selected by an agent, to be appointed by the president for that purpose; to be selected on or before the first day of public sale of lots at that place.' The act also stipulated for the payment of fifty thousand dollars for the league and labor, thus granted to Menard. 1 Cong. 71, Sec. 4, 5. The president was required to make a title in the name of the republic, upon the payment of the money. Id. Sec. 2, 3.

"These provisions show unquestionably that negotiations had transpired between the government and Menard, for the building of a town upon the island of Galveston, which would be a

port of entry; and that the subject was practically surveyed, and well considered by them. This is confirmed by extrinsic circumstances. The grant was made large enough to include that part of the island, nearest the bar, where it was practicable to build a town of any considerable size, and where the channel of the bay approached nearest the edge of tidewater. This particular locality was pointed out, as the suitable point for the town, by its relation to the passage into the gulf from the bay; by its situation being suitable to protect vessels as an harbor; by its position in reference to the Trinity and San Jacinto rivers, Buffalo Bayou, and east and west bays. The island was cut off from the main land, and surrounded by shallow water, which prevented the approach to dry land by vessels, but which also cut off all communication with the island except by water. *The only approach to the town, that could have been anticipated, was through this navigable channel. The town was yet to be built; even building materials, fire wood, and provisions had to be brought to the town by water. The necessities of the country required its immediate erection,* as the principal port of entry on the coast, and as the best commercial deport of the republic. Commerce constituted the only inducement to its settlement, and by that alone, must it start into existence. Wharves must be built at great expense, in order to build up the city. How far out must they go? The ordinary tides rose only eighteen or twenty inches. From the action and reaction of the waters of the gulf and the bay, through the pass, as affected by the winds, the tides, three or four times a month, overflowed the strand (Avenue B), which would extend the flats to a width of about seven hundred feet,

and as often receded nearly or quite to the channel. Again five or six times in the year, during the winter, the tides receded to the very channel, leaving the ground entirely free from water; and as often arose to Market Street (Avenue D), extending the flats in width, one thousand feet. . . .

"If, then, it be admitted, that the contracting parties understood and appreciated the difficulties of the enterprise, and desired its success (which we cannot doubt), then it reasonably follows, that they intended to do what, under the circumstances, was absolutely necessary to its accomplishment; *and that was, to vest in some one, the right to erect wharves upon the channel.* . . .

"*That the private appropriation of lots on the channel, for wharves, was contemplated, and that streets were to be left open for public use, out to the channel, was abundantly illustrated by the practical action of the founders of the city, in reference to the subject.* . . .

"The act of congress of the 5th February, 1840, incorporating the city of Galveston, defines its corporate limits, by reference to the patent, as follows: 'All that section of territory, lying between Seventh Street and Thirty-first Street, including the harbor and anchorage of Galveston, and running from the front line on the bay, as defined in the patent or deed, to the Galveston Company, from the government of Texas to the gulf between the streets aforesaid.' 4 Cong. 273. Here is a recognition on the part of the congress, that the title to Menard to the east end of Galveston island, had been made by

a definite line, constituting the front line of the bay, in reference to the harbor and anchorage. *This is at least evidence, that the government understood the grant to Menard to extend to the channel. . . .*

"By the strict letter of the legislative grant, Menard's right of property did not extend to the channel. It is extended there, only by resort to the plain intention of the contracting parties. . . . " (Emphasis ours).

Sydnor's and Offitt's Bayous were not included in the Menard grant and are nowhere near the deep-water channel of Galveston Bay near the Port of Galveston and there is absolutely nothing in the record to show that the grants in question were extraordinary and that the waters of these Bayous were intended to be conveyed by the sovereign. The Menard grant stands as an extrordinary grant because of the abundant facts and evidence in the record in that case to support it as such as thoroughly shown in the court's opinion, portions of which are quoted above. The grants in the case at bar are merely ordinary grants and there is absolutely nothing in the record to show otherwise, and the errors of surveyors, map makers and ministerial officers in including these bayous in the perimeter of the field notes of the grants in question did not divest the State of its title thereto.

5. THE CIRCUIT COURT MISINTERPRETED THE CASE OF HEARD V. TOWN OF REFUGIO, 129 Tex. 349, 103 S. W. (2) 728.

The Circuit Court in its opinion refused to give any effect to the Heard case whatever. R. 32.

A careful study of the Heard case will disclose that the Supreme Court of Texas closely followed the rules of property law set out in the Menard case, supra, in that the court held:

A. Under the Civil and Common Law tide waters are Navigable waters and were reserved to the common use of all the people.

B. The Act of Dec. 14, 1837, by the Congress of the Republic of Texas made rivers in Texas insofar as they maintained an average width of 30 feet from their mouth up, navigable waters.

C. The Act of Dec. 14, 1837, by the Congress of the Republic of Texas, was carried forward by the State of Texas when it became one of the United States.

D. Rivers in Texas under the statute are navigable waters and are reserved to the common use of all the people.

E. The decision of the Supreme Court of Texas in the case of *Heard* v. *Town of Refugio*, supra, determined that rivers in Texas under both the civil law and the statutory law were navigable waters, and were subject to the identical rules of law that were applicable to tide waters. The holding of the Supreme Court of Texas in the case of *Galveston* v. *Menard*, supra, was closely followed in the case of

Heard v. *Town of Refugio.*

F. The case of *Heard* v. *Town of Refugio* should be read as dealing with navigable waters and not as river beds. When read in that light it is very clear that the holding of the Supreme Court of Texas in the case of *Heard* v. *Town of Refugio* clearly followed the rules of property, the rule of strict construction, as was set out in the case of *Galveston* v. *Menard.*

6. ERROR OF THE CIRCUIT COURT IN FOLLOWING THE ERRONEOUS CIVIL APPEAL COURT CASES.

The Circuit Court erred in following and giving weight to the decisions of the Texas Court of Civil Appeals in the cases of *Baylor* v. *Tillebach*, 49 S. W. 720; *North American Dredging Company* v. *Jennings, et al*, 184 S. W. 287; and *Filipas* v. *Chuoke*, 10 S. W. (2) 807.

The State of Texas was not a party to any of said suits and its rights were not presented in any of said cases, and none of said cases are in any manner binding on the State of Texas.

We also wish to point out that the Circuit Court erred in holding that the three Civil Appeals cases cited above passed on the title to the auction lots. No court has ever passed on the title to the auction lots.

The case of *Baylor* v. *Tillebach*, supra, was a trespass to try title suit between private parties for a

portion of Offitt's Bayou. The only pertinent portions of the opinion here are quoted as follows:

"For convenience, we will state here the supposed claim of title relied upon by appellants to recover the property, and then consider the several links in it claimed by appellees to be broken or defective. It is as follows: (1) A patent issued by the republic of Texas on November 15, 1840, to Edward Hall and Levi Jones, granting them 18,215 acres of land on Galveston Island, which land includes the premises in controversy. This patent was, by a special act of the Legislature of Texas, on the 18th day of February, 1854, confirmed *and by said act the state disclaims any title to the land described in the patent.* . . .

"The patent from the republic of Texas to Hall and Jones, affidavit of the loss of the original having been made, was proven by a certified copy from the records of the county court of Galveston County. . . . The legislative confirmation of the grant was proven by certified copy of the special act, under the hand and seal of the serceretary of state. It may be said, therefore, that the first link of the appellants' chain of title is established beyond controversy. But appellees here contend that the property involved in this suit is navigable waters, and therefore not subject to grant. There is nothing in this contention, for it is well established that a state may grant to individuals or corporations the soil of public navigable waters. Gould, aters, Sec. 36, and authorities cited in note." (Emphasis ours).

Thus from the above it can clearly be seen that the Court of Civil Appeals only took a surface glance at the patent, seeing that the field notes crossed Offitt's Bayou, and held between the private parties as it did. It is also clear that the court did not go into the matter very deeply as it does not cite any cases at all, but just holds. This case very obviously did not consider or determine the title of the State of Texas and we say is worth nothing to Respondents as it is in conflict with all the decisions of the Texas Supreme Court we have heretofore cited.

The case of *North American Dredging Company* v. *Jennings, et al*, 184 S. W. 287, was a suit brought by private parties to enjoin other private parties from taking oysters from Offitt's Bayou.

The only pertinent portions of the opinion are as follows:

> " 'I find that the plaintiffs are the owners of the land under Offatt's Bayou designated in their petition, both under patent from the Republic of Texas on November 28, 1840, to said Hall and Jones, and by special act of the Legislature of Texas, February 9, 1854, confirming said grant, decree of partition, and mesne conveyance thereunder.' . . .
>
> "The third finding of fact by the trial court shows that the state has parted with its title to the land under said bayou involved in this suit."

This case also cited the oyster right statute and held correctly that the oyster rights granted there-

by were entitled to protection by injunction. That was the main holding in the case. The title to Offitt's Bayou was mentioned only in a surface respect thereto. The State of Texas was not a party; its rights were not presented and is not bound by the erroneous holding with respect to the title of Offitt's Bayou.

The case of *Filipas* v. *Chouke*, 10 S. W. (2) 807, a Texas Court of Civil Appeals case is heavily relied upon by the Circuit Court to sustain its opinion. The pertinent portions of this case are quoted as follows:

> " '6. That defendant Chris Chuoke also claims to own the bed of said bayou where it runs through his said land; that this claim is based on the fact that he holds same under deed from Jones and Hall, to whom was patented on November 20, 1840, all of Galveston Island west of what is known as the Menard Grant. The original survey of said grant calling for the line to cross the mouth of Offitt's Bayou (then known as Oyster Bayou), thereby including all of Offatt's Bayou within said grant. Chuoke's contention in this regard seems to have been sustained in Baylor v. Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720.
>
> " . . .
>
> "On an agreed statement and map accompanying the record it is shown that lines of the sub-division of the Jones and Hall grant owned by appellant cross Sydnor's bayou, and appellant's deed to these subdivisions includes the land under the waters of the bayou.

"The refusal of the learned trial judge to perpetuate the temporary injunction protecting appellant's property rights in his oyster beds is based upon the conclusion that, because Sudnor's bayou was more than 30 feet in width, was connected with Galveston Bay, and affected by its tides, it was in fact and law a navigable stream, in which a citizen could obtain no right superior to the right of the public to its navigation. *This conclusion ignores the admitted fact that the state, the sovereign owner of the bayou, has granted to appellant and those under whom he holds title to all of the rights of the public in the bayou.*

"*The title of Jones and Hall, and those who hold under them, to the land covered by the navigable waters embraced within the lines of the grant, was confirmed by special act of the Legislature passed in* 1854 (*Gammel's Laws of Texas, vol.* 4 *c.* 73, *p.* 125). *In addition to this Article* 4028 *gives to the owner of any bayou included within the bounds of any original grant the exclusive right to use the bayou for planting, growing and gathering oysters.*

" . . .

"The question of the validity of the act of the Legislature giving to the owners of land, the metes and bounds of which as set out in the original grant include any creek, bayou, or lake, the exclusive right to plant and gather oysters therefrom, was passed upon and upheld by this court in the case of North American Dredging Co. et al v. Walter Jennings, et al (Tex. Civ. App.) 184 S. W. 287.

"*Appellant's property right in his oysters be-*

ing inherent in his title to the land on which the oysters were planted and are growing, and being expressly confirmed by the statute above cited, he is entitled to full protection in such right, and we think under the fact finding of the trial court the perpetual injunction asked by him was necessary for such protection." (Emphasis ours)

Thus we see clearly that the Court of Civil Appeals directly held that the State of Texas had parted with its title to the submerged lands under Sydnor's Bayou, and cited the other Court of Civil Appeals cases cited by appellee herein, to-wit, *Baylor et al* v. *Tillebach*, supra, and *North American Dredging Company et al* v. *Jennings*, supra, in support thereof.

HOWEVER THE SUPREME COURT OF TEXAS DID NOT APPROVE THE HOLDING OF THE COURT OF CIVIL APPEALS IN THE CHOUKE CASE, SUPRA, THAT THE STATE OF TEXAS HAD PARTED WITH ITS TITLE TO THE BED OF SYDNOR'S BAYOU BY THE ISSUANCE AND CONFIRMATION OF THE HALL & JONES PATENT, AND EXPRESSLY STATED IN ITS OPINION THAT IT WAS UNNECESSARY TO EXPRESS ANY OPINION WHATEVER ON THAT QUESTION.

We quote from the opinion of the Supreme Court of Texas in the case of *Filipos* v. *Chouke*, 40 S. W. (2d) 38, as follows:

"The record in this case discloses the following:

"Chris Chouke is the owner of certain lands on Galveston Island. This title is held by Chouke by mesne conveyances from Jones and Hall, to whom it was originally patented on November 28, 1840. This patent was validated by act of the Legislature of Texas passed February 8, 1854. Gammel's Laws of Texas, Vol. 4, p. 125. The validating act in question reads as follows:

" * * *

"The original survey lines of the Jones and Hall survey, and also Chouke's field notes, include the land in the bayou where Chouke has the oyster bed involved in this suit. Also the land owned by Chouke lies on both sides of said bayou and the oyster bed is located between the two banks. *In other words, if the patent is valid to the extent of including therein the part of the bayou covered by its lines, Chouke is the owner of the land where his oyster bed is situated.* At the time this suit was instituted, and for many years prior thereto, Chouke had growing at the bottom of the bayou at the place above mentioned a valuable oyster bed. This bed was worth about $20,000 and produced an annual income of from two to three thousand dollars.

" * * *

"On appeal the Court of Civil Appeals at Galveston (10 S. W. (2d) 807) reversed and rendered this judgment, holding that Chouke was the owner of the land at the bottom of the

bayou and had the right to prevent navigation thereon by Filipos et al. The Court of Civil Appeals further held if Chouke was not the owner of said land that he had the right to grow oysters at the point where said bed is located under the provisions of article 4028, R. C. S. of Texas, 1925, and should be protected in such rights as against Filipos et al. In other words, the Court of Civil Appeals held that under the provisions of article 4028, supra, Chouke has the right to grow oysters at the point where his oyster bed is located, and that such right is paramount to the right of Filipos to navigate the bayou so as to damage or destroy such oyster bed. The Court of Civil Appeals, bases this holding on the further holding that the *land at the bottom of the bottom of the bayou, if not the property of Chouke, is the property of the state, and that the state has the power to grant the rights conferred by article* 4028, *supra, in the absence of any federal act to the contrary.*

"WE ARE OF THE OPINION THAT THE HOLDING OF THE COURT OF CIVIL APPEALS WITH REFERENCE TO CHOUKE'S RIGHT UNDER ARTICLE 4028, SUPRA, IS CORRECT, AND THIS BEING TRUE, IT IS UNNECESSARY FOR US TO DECIDE WHETHER HE HOLDS TITLE TO THE LAND WHERE HIS OYSTER BED IS LOCATED. (Capitals ours).

"Article 4028, supra, reads as follows:

"Under the terms of the above-quoted article, it is expressly provided that whenever any bayou is included within the metes and bounds of an original grant or location of land in this

state, the lawful occupant of such grant or location is given the exclusive right to gather plant, and sow oysters. It is also expressly provided that if such bayou, etc., is not included within such metes and bounds, the exclusive right of the riparian owner, shall, whenever the width of such creek bayou, lake, or cove is 200 yards or less, extend to the middle thereof, and whenever the width of such waters is more than 200 yards, extend 100 yards, from shore. *We think this statute is in all respects valid and under the facts of this record operates to protect Chouke in his property rights in the oyster bed in question. We are further of the opinion that so long as this statute remains in force Chouke will be protected thereunder regardless of whether he has title to the submerged land where his oyster bed is located ,or not.* In other words, since Chouke's field notes, and the field notes of the grant under which he holds cover the point where the oyster bed is located, and since he is abutting property owner on either side, he is protected in his right to grow oysters at the point in question *regardless of the question as to whether the original grant and validating act above referred to operate to vest title in him to the submerged land in question.* * * *

" * * * *

"We conclude from the above authorities that the Court of Civil Appeals was correct in reversing the judgment of the trial court and rendering same in favor of Chouke *on the ground that he was protected in his oyster bed in question here under the provisions of article* 4028.

"THIS BEING TRUE, WE THINK IT IS

ABSOLUTELY UNNECESSARY TO EXPRESS AN OPINION AS TO THE VALIDITY OF CHOUKE'S TITLE TO THE LAND WHERE THE OYSTER BED IS LOCATED. WE THEREFORE REFRAIN FROM EXPRESSING ANY OPINION WHATEVER ON THAT QUESTION." (Capitals ours).

(Note. The State of Texas in the case at bar has always recognized the statutory oyster rights of Chuoke et al and does not claim the compensation due for the taking of the oyster beds. The State has always maintained however that it owns the bottom of Sydnor's Bayou and is entitled to the compensation due for the taking of such bottoms.)

From the Supreme Court's opinion above it is clear that the Supreme Court of Texas has not directly passed on the State's title to the bed of Sydnor's or Offitt's Bayou, and it is clear from the Supreme Court's opinion above that the attempts of the lesser courts of Texas (in the three courts of Civil Appeals cases cited by respondents and relied on by the Circuit Court) to fritter away the State's title to such bayous were definitely halted and curbed by that pronouncement of the Supreme Court of Texas.

We also think that it is now crystal clear to this Honorable Court that the ill-considered and mere surface opinions of the three Court of Civil Appeals cases relied on by the Circuit Court are contrary to the overwhelming weight of the Texas Supreme Court cases hereinabove cited.

7. NEITHER ADVERSE POSSESSION, PAYMENT OF TAXES NOR 'MAP MAKERS' CAN AFFECT THE STATE'S TITLE TO SYDNOR'S AND OFFITT'S BAYOUS.

In support of this well settled principle of law we quote from the case of *Weatherly* v. *Jackson*, Supreme Court of exas. 71 S. W. (2) 259, as follows:

> "Defendants in error urge as additional grounds of estoppel the official maps in the Land Office, the adverse possession of the land with *payment of taxes* and the failure of the Commissioners of the General Land Office, the Attorneys General, and the Governors during the period of such possession to question the claim of defendants in error by instituting or causing to be instituted suit for the recovery of the land. On the authorities last above cited and for the reasons which have been set out in discussing the ruling of the Court of Civil Appeals on the question of estoppel and in passing upon the admissibility and probative value of the Land Office maps, these are not sufficient, singly or collectively, either to estop the state or to divest it of title. To the authorities may be added the rule that the failure of public officers to perform their duties will not work an estoppel against the State. 10 R. C. L., p. 705. This reference is not intended as a criticism of the public officials mentioned, for the state has made few, and no adequate, appropriations which could be used to discover or prove the existence of unsurveyed school land adversely possessed." (Emphasis ours).

In the very recent case of *Harris* v. *O'Connor*, Tex. Civ. App., 185 S. W. (2) 993, writ of error refused for want of merit by the Supreme Court of Texas, the Court stated:

> "Furthermore, it is fundamental that a state cannot be divested of a proprietary title by limitations, laches, recognition, etc., she is not bound by the defaults or negligence of her officers or agents. Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865; Jones v. Robison, 104 Tex. 70, 133 S. W. 879; Weatherly v. Jackson, 123 Tex. 213; 71 S. W. (2) 259; Grayburg Oil Co. v. State, Tex. Civ. App., 50 S. W. (2) 355, writ refused.' 185 S. W. (2) 1009.

In *Humble Oil & Refining Co.* v. *State*, Tex. Civ. App., 162 S. W. (2) 119, writ of error refused by the Supreme Court of Texas, the Court held:

> "The State's title is not affected by the lapse of time, laches, adverse possession or payment of taxes. It is not estopped or adversely affected by the dereliction or failure to act of its officers, nor the declarations, or acts or long recognitions of others. *These principles are so well established as to be now regarded as elementary.* They are discussed in Weatherly v. Jackson, supra." 162 S. W. (2) 134.

CONCLUSION

The question involved is one of vital importance to the school children of Texas in that the beds of

Sydnor's and Offitt's Bayous, involved herein, as well as millions of acres of submerged lands within the borders of Texas are dedicated to the public free schools of Texas. That the decision of the Circuit Court holding the State did not own Sydnor's Bayou is in substantial and irreconciliable conflict with the applicable local decisions of the highest Court of Texas. That such erroneous decision places a heavy cloud against the State's title to Offitt's Bayou, a very valuable Bayou, containing thousands of acres of land. For the reasons stated, the above cause is highly important to the State of Texas and it most vigorously and earnestly appeals to this great court to give it the protection it is entitled to receive. It is, therefore, respectfully submitted that this petition for certiorari should be granted.

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APPENDIX

AN ACT

To Dispose of Galveston and other Islands of the Republic of Texas

BE IT ENACTED by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the secretary of the treasury be, and he is hereby authorized and required to cause the Island of Galveston except the league and labor sold to M. B. Menard and associates, and all other islands within this republic to be surveyed in lots not less than ten nor exceeding forty acres each, and that he cause the same to be sold at auction to the highest bidder, on the second Monday of November next at the State house in the City of Houston, the proceeds of the sale to be paid in specie or the notes of current and specie paying banks, in the following manner, towit: One-fourth part thereof to be paid down, and the other three-fourths to be in three equal installments of three, six and nine months.

Sec. 2. Be it further enacted, That all persons, aliens not excepted, shall have the privilege of purchasing and holding the same, and the president is authorized to issue patents to them accordingly.

Sec. 3. Be it further enacted, That the proceeds of the sales of all such islands as may be sold by virtue of this act, shall be applied as follows, towit:

one-half to be applied to the purchase of arms, munitions of war, clothing and pay for the army, one-ourth for the navy, and one-fourth shall be paid into the treasury of the republic to be paid out only for the redemption of the promissory notes of the government contemplated to be issued by a law previously passed by this congress.

Sec. 4. Be it further enacted, That the secretary of the treasury shall cause the aforesaid sale to be published for three months previous to the day of sale in New Orleans, Mobile, Charleston, Baltimore, Philadelphia, New York, Boston, Nashville and Louisville, Ky., papers.

Sec. 5. Be it further enacted, That the secretary of the treasury be authorized to pay the expenses of surveying, advertising and sale, out of the first money from the sales aforesaid.

Sec. 6. Be it further enacted, That if any persons who shall purchase any of the aforesaid lots or lands, shall fail to make payment of the several instalments in conformity with this act, he or they shall forfeit all such sums as they have previously paid, and the lots and lands purchased by such defaulter shall revert to the government of this republic.

B. T. ARCHER
Speaker of the House of Representatives
JESSE GRIMES
President Pro Tem of the Senate
Approved June 12, 1837.

JOINT RESOLUTION

Authorizing the President and Commissioner of the General Land Office to issue titles to purchasers of Lots on Galveston Island.

Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That the President of the Republic and the Commissioner of the General Land Office are hereby authorized and required to issue titles to purchasers of lots on Galveston Island; provided, that the said purchasers shall deliver to the Commissioner a certificate of purchase, with a receipt for the payment of the purchase money in full, from the Secretary of the Treasury.

JOSEPH ROWE
Speaker of the House of Represenattives
MIRABEAU B. LAMAR
President of the Senate

Approved May 9, 1838.
SAM HOUSTON

CHAPTER LXXIII

An Act to confirm the patent issued by the Commissioner of the General Land Office to Levi Jones and Edward Hall, on the twenty-eighth day of November, eighteen hundred and forty.

Section 1. Be it enacted by the Legislature of the State of Texas, That the patent issued by the Com-

missioner of the General Land Office, on the twenty-eighth day of November, eighteen hundred and forty, to Levi Jones and Edward Hall, for lands on Galveston Island, be, and the same is hereby confirmed, and the State of Texas disclaims any title in and to the lands described in said patent, in favor of the grantees and those claiming under them.

Passed February 8, 1854.